90-1746

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER SMITH TROEN, Petitioner

v.

STATE OF OREGON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF OREGON

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED FOR REVIEW

1. Does the Sixth Amendment, made applicable to the states through the Fourteenth Amendment, prevent a state from erecting arbitrary evidentiary barriers to the receipt of otherwise relevant evidence which raises the defense of necessity?

2. Does the Oregon Supreme Court deny a defendant his right to present a defense under the Sixth and Fourteenth Amendments when it concludes that the defense of necessity, under these facts, is, as a matter of law, inconsistent with some other provision of law, to-wit: 9 CFR § 3.1, et seq.?

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IV. PETITION FOR CERTIORARI

The petitioner, Roger Smith Troen, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon, entered in the above-entitled proceeding on December 4, 1990.

V. OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon which affirmed the order of the trial court barring the receipt of any evidence to establish the defense of Choice of Evils (necessity) is attached herein as Appendix D. The order of the Supreme Court of the State of Oregon denying petitioner's petition for review of the decision of the Court of Appeals of the State of State of Oregon, without opinion, is attached as Appendix E.

VI. STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

VII. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI, United States Constitution. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crimes shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

Amendment XIV, United States Constitution. "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

VIII. STATEMENT OF THE CASE

On March 30, 1987, a group of unknown individuals entered a University of Oregon psychology department laboratory building, in Eugene, Oregon. Facts developed in a subsequent police investigation revealed that those persons who entered the laboratory facility removed a number of laboratory animals from the premises, damaged certain laboratory equipment, and spray-painted "Animal Liberation Front" (ALF) slogans on laboratory walls. Subsequent to the break-in, a news communique was delivered to a local television station by unknown representatives of ALF. In that communique, responsibility was accepted for the break-in, and a list of abuses of

laboratory animals by the research facility was offered as justification for the break-in. On April 22, 1987, petitioner alone was indicted by the grand jury of Lane County, Oregon, on charges of CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE, BURGLARY IN THE SECOND DEGREE, and THEFT IN THE FIRST DEGREE, respectively violations of Oregon Revised Statute sections 161.450, 164.215, and 164.055, upon the allegation that he aided and abetted the principals to the offenses.

To the charges in the indictment, the petitioner pled not guilty. In a timely fashion thereafter, he filed the requisite statutory notice of intent to raise the defense of Choice of Evils (necessity). Oregon Revised Statutes 161.055 and 161.200.

Upon receipt of the notice of intent to rely upon the defense of Choice of

Evils, the state filed a pre-trial motion in limine, in which it sought to preclude the petitioner from offering any evidence in support of the defense of Choice of Evils. The trial court then permitted an extensive offer of proof made by the petitioner (Tr. 30-614).[1] A summary-form offer of proof was also made by counsel for the state in support of its pre-trial motion to limit introduction of evidence (Tr. 619-625).

Petitioner's evidentiary offer of proof consisted of essentially the entirety of what would have been his case-in-chief before a jury. It included the extended testimony of 16 separate witnesses, both lay and professional, as well as 28 separate exhibits. The exhibits themselves

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[1]"Tr." refers to transcript of proceedings in trial court; "Ex." refers to trial court exhibits received.

were compromised of publicly available reports, which described the principal animal research being conducted at the University of Oregon research facilities (petitioner's Exs. 118, 119, 120); graphic photographic evidence of research practices and abuses (petitioner's Exs. 101-112); graphic video-taped documentaries of other similar research practices and animal abuses (petitioner's Exs. 114, 115, 116); various governmental inspection reports and policies (petitioner's Exs. 113, 121, 123); and a video-taped deposition and transcript of witness Lucinda Muniz, who was the citizen member of the University of Oregon Institutional Animal Care and Use Committee. The purported function of this committee was to critically review and approve or disapprove certain research proposals and practices based upon, among other factors, veterinary and ethical

considerations of the welfare of the subject animals (petitioner's Exs. 124, 126). The testimony of Muniz revealed the sham nature of the operation of this committee.

Also included among the petitioner's proffered evidence was testimony from hostile witnesses, Dr. Richard T. Marracco, Dr. Barbara Gordon-Lickey, and Gregory Stickrod, who were, respectively, the principal researchers involved, and the director of animal care and use at the University of Oregon. Testimony was also taken from several individuals, who had previously been students at the University of Oregon, employed to work in various capacities in the animal research laboratories. Testimony was also taken from a number of expert witnesses, concerning animal research practices and the growing awareness in the scientific

community of the abusive practices regarding the animal subjects so employed. Proffered testimony was also taken from the petitioner, which established his long-standing involvement in matters of animal welfare, his vast lay knowledge of widespread abuses among animal researchers generally, and the researchers at the University of Oregon specifically. Petitioner also testified concerning his and others' protracted past unsuccessful efforts to get the University of Oregon administrators and animal researchers to voluntarily reform their policies and practices regarding the use of animals in research. Petitioner also testified regarding his reasonable beliefs as to the necessity of his actions aiding and abetting those involved in the laboratory break-in.

After consideration of the extensive

offer of proof of petitioner and the more limited summary-form proffer of the state, and after having considered respective legal arguments, the trial court granted the state's motion to preclude the receipt of any and all evidence proffered by petitioner in support of the defense of Choice of Evils. The trial court ruled that the entirety of petitioner's evidence was irrelevant and inadmissible to raise the defense of Choice of Evils as a matter of law. See Appendix A. Petitioner then was tried upon stipulated facts and convicted. The judgment orders of conviction are set forth at Appendices B and C. Petitioner then appealed to the Court of Appeals of the State of Oregon. The Oregon Court of Appeals in its opinion (Appendix D) held that petitioner was not entitled, as a matter of law, to present the proffered evidence in support of a

defense of Choice of Evils. It reasoned, inter alia, that petitioner's asserted defense of Choice of Evil was "inconsistent * * * with some other provision of law," citing the related Oregon Court of Appeals decision of State v. Clowes, 100 Or. App. 266, 785 P.2d 1071 (1990), decision on petition for review by Oregon Supreme Court at 310 Or. 686, 801 P.2d 789 (1990).

In petitioner's case, the Court of Appeals reasoned that it was the "extensive federal regulations" governing the treatment of animals used in experimentation, under 9 C.F.R. § 3.1 et seq., which authorized the conduct petitioner asserted was the greater harm sought to be avoided. The court also opined that petitioner had failed to allege in his proffer at the trial court specific violations of those regulations which would further justify his conduct under a defense

of Choice of Evils (see decision of Court of Appeals, Appendix D at page 4). But see petitioner's proffer for such detailed instances of federal and state law violations.

Petitioner then sought review to the Oregon Supreme Court, which court denied review without opinion (Appendix E).

IX. REASONS WHY THE ISSUES PRESENTED HAVE IMPORTANCE BEYOND THE PARTICULAR CASE AND REQUIRE A DECISION BY THE UNITED STATES SUPREME COURT

A. The Sixth and Fourteenth Amendments prevent states from erecting arbitrary evidentiary barriers to the receipt of otherwise relevant evidence which raises the defense of necessity.

That the states have the authority to enact their own rules of evidence concerning the trials of state crimes is not doubted. The United States Supreme Court has held, however, that a limitation upon such evidentiary rulemaking is the Due

Process Clause of the Fourteenth Amendment. Spencer v. Texas, 385 U.S. 554, 568-569 (1966). In petitioner's case, as in the companion case of State of Oregon v. Clowes, 310 Or. 686, 801 P.2d 789 (1990), the Oregon court contorts a basic definition of relevancy as the means by which it justifies the exclusion of evidence which tends to raise the defense of Choice of Evils. See State v. Clowes, supra, at 691-692. Such an exercise is precisely what the United States Supreme Court has previously condemned as a mechanistically applied rule which defeats the ends of justice. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). In that case the Court held that the Mississippi hearsay rule, as applied, stood as a barrier to the vindication of the important constitutional right of an accused to present witnesses in his own

defense. Supra at 302. The Chambers court relied heavily upon its prior ruling in Washington v. Texas, 388 U.S. 14, 19 (1967). In Washington, the court held:

> "The right to offer the testimony of a witness, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law."

Supra at 19. In the more recent decision of Crane v. Kentucky, 476 U.S. 683 (1986), the court held that the criminal defendant would be deprived of his fundamental constitutional right to a fair opportunity to present a defense, (whether under the Due Process Clause of the Fourteenth Amendment or under the Compulsory Process

or Confrontation Clauses of the Sixth Amendment), by the exclusion of testimony concerning the circumstances of an alleged confession. In so holding the court stated:

> "* * * Moreover, we have never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interest of fairness and reliability--even if the defendant would prefer to see that evidence as admitted. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). Nonetheless, without 'signal[ing] any diminution in the respect traditionally accorded to the states in the establishment and implementation of their own criminal trial rules and procedure,' we have little trouble concluding on the facts of this case that the blanket exclusion of the proffered testimony about the circumstances of petitioner's confession deprived him of a fair trial." Id. at 302-303.
>
> "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, Chambers v. Mississippi, supra, or in the Compulsory Process or

Confrontation Clauses of the Sixth Amendment, Washington v. Texas, 388 U.S. 14, 23 (1967); Davis v. Alaska, 415 U.S. 308 (1974), the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S., at 485; cf. Strickland v. Washington, 466 U.S. 668, 684-685 (1984) ('The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment'). We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard. In re Oliver, 333 U.S. 257, 273 (1948); Grannis v. Ordean, 234 U.S. 385, 394 (1914). The opportunity would be an empty one if the state were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence. In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.' United States v. Cronic, 466 U.S. 648, 656 (1984). See also

> Washington v. Texas, supra, at 22-23."

Supra at 690-691.

The United States Supreme Court in the decision of Rock v. Arkansas, 483 U.S. 44 (1987) had occasion to deal with another state blanket evidentiary exclusionary rule that challenged the constitutional principles embodied in both the Sixth and Fourteenth Amendments. The case dealt specifically with the question of the exclusion of post-hypnosis testimony of a defendant. In pertinent part the court held as follows:

> "Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In Chambers v. Mississippi, 410 U.S. 284 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to 'present

witnesses in his own defense.' Id. at 302. * * * This court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may 'not be applied mechanistically to defeat the ends of justice' but must meet the fundamental standards of due process. Ibid.

"Of course, the right to present relevant testimony is not without limitation. The right 'may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' Id. at 295.[11] But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify."

"[11]Numerous state procedural and evidentiary rules control the presentation of evidence and do not offend the defendant's right to testify. See, e.g., Chambers v. Mississippi, 410 U.S., at 302 ('in the exercise of this right, the

> accused, as is required of the state, must comply with established rules of procedure and evidence designed to ensure both fairness and reliability and the ascertainment of guilt and innocence');
> Washington v. Texas, 388 U.S. 14, 23, n. 21 (1967)(opinion should not be construed as disapproving testimonial privileges or nonarbitrary rules that disqualify those incapable of observing events due to mental infirmity or infancy from being witnesses)."

Supra, at 55-56.

The blanket exclusionary effect of the holding of the Oregon Supreme Court in petitioner's case, as fully explained in the Clowes, opinion, supra, as well, is the kind of evidentiary barrier so firmly disapproved of by the United States Supreme Court.

The effect of such a blanket exclusionary evidentiary rule was to deny petitioner his right to a jury trial. As

recognized by this court in Duncan v. Louisiana, 391 U.S. 145 (1968), the right to trial by jury in a criminal case is fundamental to our scheme of justice. As such, the Sixth Amendment's guarantee of right to trial by jury was extended to the states through the Fourteenth Amendment. The essence of the court's reasoning was that the very purpose of a jury trial was to prevent oppression by the government, supra at 155.

The right to a trial by jury would be an empty right were it not the right to a fair trial. As this court observed in U.S. v. Nixon, 418 U.S. 683 (1974):

> "* * * We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or

speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense." Supra at 709.

"* * * *

"The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right 'to be confronted with the witnesses against him' and 'to have compulsory process for obtaining witnesses in his favor.' Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced."

Supra at 711. See also Pennsylvania v.

Ritchie, 480 U.S. 39, 55, 56 (1987)(a discussion of the contours of the Compulsory Process Clause); McCleskey v. Kemp, 481 U.S. 279, 305-306 (1987)(concerning a consideration of limitations a state may impose on the receipt of relevant evidence offered by the defendant in the penalty phase of a capital case); Taylor v. Illinois, 484 U.S. 400, 407-409 (1988)(construing the Compulsory Process Clause of the Sixth Amendment as being violated in some instances by a blanket exclusion of the testimony of a material defense witness, as a result of the imposition of a discovery sanction); and Coy v. Iowa, 487 U.S. 1012, 1015-1020 (1988)(finding a violation of the Confrontation Clause by a criminal procedural rule permitting a claimed victim of sexual abuse to testify from behind a screen to avoid viewing by the accused).

Each of the above-cited authorities represents a clear standard which has been enunciated by this court, designed to guarantee that the fundamental constitutional right to a fair trial before a jury of one's peers is not denied as a result of the erection of arbitrary evidentiary rulemaking by states. In petitioner's case, as in the companion Clowes opinion, supra, the Oregon court arbitrarily and unreasonably excludes relevant evidence in a mechanistic fashion, as a result of previously having declared that a defense of Choice of Evils is, as a matter of law, inconsistent with, in petitioner's case, pre-existing federal regulations purportedly permitting the practices complained of. In the Clowes, supra, rationale, similar reasoning was employed to justify the exclusion of all evidence establishing the defense of Choice

of Evils based upon the claimed inconsistency with the decision in Roe v. Wade, 410 U.S. 113 (1973) and Oregon statutory provisions regarding elective abortion. In petitioner's case, at least, the Oregon court is clearly in error in its conclusion that the defense of Choice of Evils is inconsistent, as a matter of law, with pre-existing federal regulations. See 9 C.F.R. § 3.1 et seq., which clearly does not sanction the practices and abuses of which petitioner complains. Further, as will be shown in the argument below, the Oregon court has misconstrued the clear legislative intent of the drafters of ORS 161.200, (Choice of Evils), so as to permit a trial court to review the merits of the substantive defense raised by proffered testimony and thereby preclude its reception and consideration by a trial jury. By such a mis-construction of the

unambiguous legislative history and intent of the drafters of ORS 161.200, petitioner's rights under the Sixth and Fourteenth Amendments have been abridged.

B. Under the facts of this case, the decision of the Oregon Supreme Court, holding, as a matter of law, that the defense of necessity may not be raised is in error. Under these facts, the defense of necessity is not inconsistent with another provision of law, to-wit: 9 C.F.R. § 3.1, et seq.

1. ORS 161.200 (Choice of Evils) is a Defense.

The Oregon statutory scheme clearly distinguishes between defenses and affirmative defenses. ORS 161.055 defines both:

> **"161.055 'Defense' and 'raised by defendant' defined; burden of proof.** (1) When a 'defense,' other than an 'affirmative defense' as defined in subsection (2) of this section, is raised at a trial, the state has the burden of

> disproving the defense beyond a reasonable doubt.
>
> "(2) When a defense, declared to be an 'affirmative defense' by Chapter 743, Oregon Laws 1971, is raised at a trial, the defendant has the burden of proving the defense by a preponderance of the evidence.
>
> "(3) The state is not required to negate a defense as defined in subsection (1) of this section unless it is raised by the defendant. 'Raised by the defendant' means either notice in writing to the state before commencement of trial or affirmative evidence by a defense witness in the defendant's case in chief."

Petitioner in this case raised the defense of Choice of Evils both by timely pre-trial notice and by attempting to offer affirmative evidence in his case-in-chief (see offer of proof).

Oregon's Choice of Evils defense, ORS 161.200, is contained within the general statutory section concerning

justification defenses. ORS 161.190, et seq. ORS 161.200 provides as follows:

> "(1) Unless inconsistent with other provisions of Chapter 743, Oregon Criminal Laws 1971 [the Oregon Criminal Code], defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a

particular class of cases arising thereunder."

Though the Choice of Evils justification defense afforded by ORS 161.200 may not be used as a way of challenging in blanket fashion the correctness of a particular criminal prohibition, (ORS 161.200(2)), its invocation necessarily raises at times difficult moral questions. The availability of the Choice of Evils defense is firmly rooted in English and American common law. According to the drafters of the Model Penal Code provision from which ORS 161.200 is, in part, derived (1971 Criminal Law Revision Commission Commentary, page 20 (Oregon District Attorneys' Association, December, 1975), Commentary to Preliminary Drafts Nos. 1 and 2 (1969) of Oregon Criminal Law Revision Commission Drafts of Articles Relating to

General Principles of Justification), the Choice of Evils defense, "like the requirements of culpability, is essential to the rationality and justice of all penal prohibitions." Page 5, Commentary to Sec. 3.02 of A.L.I. Model Penal Code, Tentative Draft No. 8 (1958). Moreover, that a Choice of Evils defense can provide no precise guide as to when otherwise criminal conduct is justified, "is not a serious objection to the rule," as many other concepts in criminal law also "call for weighing of conflicting values." Id., at p. 9.

In a case such as petitioner's, this weighing of conflicting values takes place on two occasions: first, when an individual, such as petitioner, is faced with a choice of conscience between inaction and action which, in the absence of justification, would be criminal, and

second, when the trier of fact evaluates the moral and legal correctness of the choice made by the individual. On neither occasion is the legislature involved, as, by enacting a statute such as ORS 161.200, the legislature has left judgment of the individual's conduct to him- or herself and, finally to citizen jurors. Stated more aptly, in this area, the people have not yielded to the government the power inherent in their sovereignty to act out of conscience, and to establish and safeguard values and moral norms.

2. Legislative History and Intent of Drafters of ORS 161.200.

In petitioner's case the trial court impermissibly weighed the merits, and categorically rejected, as a matter of law, petitioner's proffered Choice of Evils defense. In so doing, the trial court, with the affirmance of the Oregon Supreme

Court, impermissibly violated petitioner's right to present relevant evidence establishing the defense of Choice of Evils to a jury.

With respect to the legislative history and intent of the drafters of ORS 161.200, the records of the Criminal Law Revision Commission, which drafted the 1971 Criminal Code, and the legislative bodies that enacted it, make absolutely clear that the trial court is not to weigh the merits of proffered Choice of Evils evidence. Rather, the trial court is only to make the minimal threshold relevancy determinations for such proffered evidence. The first two preliminary drafts of the Choice of Evils statute contain an additional subsection (3), which would have expressly required the trial court to

undertake such a review, as a matter of law:

> "Whenever evidence relating to the defense of justification under [the choice of evils statute] is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification."

Article IV, Section 3, Preliminary Drafts Nos. 1 and 2. This proposed subsection was discussed at length by the subcommittee of the Criminal Law Revision Commission that was assigned to draft the justification statutes. A number of grave concerns about the advisability of such a trial court review were raised. First, it was noted that this provision constituted a major departure from existing law. Criminal Law Revision Commission, Subcommittee No. 1 Minutes, August 15, 1969, page 5. Serious concerns were also raised about the constitutionality of a procedure by which

issues of fact would be withdrawn from the jury. Id. It was also feared that this provision would unduly restrict the availability of the Choice of Evils defense. Id. at 6. Moreover, it was felt as a policy matter that the balancing of harms required by the Choice of Evils defense was more appropriately a task for the jury than the trial court. Criminal Law Revision Commission, Tape 80, Oregon State Archives. The subcommittee ultimately decided not to act on Subsection (3) before passing their draft on to the full Commission because a member was absent, and because they felt the issue merited further reflection. Id.

Subsection (3) was then given extensive consideration when the draft of the Choice of Evils defense was considered by the entire Commission. Concerns were again raised that such a trial court review

would constitute a denial of the right to jury trial. Criminal Law Revision Commission, November 7, 1969 Minutes, page 26. It was also noted that subsection (3) allocated the balancing of harms to the trial court, which was contrary to the thrust of subsection (1). Id. Concerns were also voiced about the feasibility of pre-trial review in light of the fact that an adequate presentation of the defense would not only require the defense to call its own witnesses but would also often involve cross-examination of the state's witnesses. Because of these concerns the Commission voted to delete subsection (3) and, thus, confine the role of the trial court to its normal role in evidentiary matters. Id. at 29.

The issue of trial court review of the Choice of Evils defense was again raised when the Commission's final draft

(introduced as Senate Bill 40) was considered by the Senate Committee on Criminal Law and Procedure during the 1971 legislative session. A proposed amendment to the bill that would have reinserted subsection (3) was rejected. Senate Criminal Law and Procedure Committee Minutes, February 26, 1971, page 5. Instead, both the Senate and the House passed the statute as drafted by the Commission. The Official Commentary to the final statute refers to the deletion of subsection (3) and expressly states that the trial court is only to rule on the "relevance and materiality" of the evidence.

The legislative determination that trial courts should not engage in a pre-trial review of the merits of a Choice of Evils defense has been faithfully adhered to by Oregon appellate courts, until

petitioner's case and that of State v. Clowes, supra. The lead case of State v. Matthews, 30 Or. App. 1133, 569 P.2d 662 (1977), held that if there is any evidence from which the elements of the defense can even be inferred, it must be submitted to the jury. In every other case in which Oregon appellate courts have upheld a trial court's withdrawal of the Choice of Evils defense, there has been a complete failure of proof as to one or more of the requisite elements of the defense. See State v. Whisman, 33 Or. App. 147, 575 P.2d 1005 (1978)(no evidence of imminence of injury); State v. Hund, 76 Or. App. 89, 708 P.2d 621 (1985)(no evidence of necessity).

Thus, the drafters of Oregon's Choice of Evils defense statute, along with prior appellate court decisions, clearly demonstrate that the trial court is not to first review the merits of the proffered

defense. As such, ORS 161.200 differs markedly from the Choice of Evils statutes of both Michigan and New York, which, together with the Model Penal Code, served, in part, as models for ORS 161.200, and which contain requirements for such preliminary rulings. Preliminary Draft No. 2 (1969) of Oregon Criminal Law Revision Commission Drafts of Articles Relating to General Principles of Justification. Subject, thus, to no special screening before presentation to the trier of fact, and rooted in the common law and in fundamental consideration of an accused's constitutional right of jury trial, the Choice of Evils defense is one which should always be considered seriously, and construed with a view toward protecting fundamental individual rights of the accused. As such, there is a clear legislative and prior appellate court

preference to the allowance of this defense when there is any evidence in the record from which the elements of a necessity defense may even be inferred. State v. Matthews, supra.

3. **Under the Facts of this Case Petitioner's Proffered Defense of Choice of Evils is not Inconsistent With Other Provisions of Law.**

ORS 161.200 was intended to be a Choice of Evils defense of general applicability. Although the Oregon criminal statutes include a variety of specific justification provisions, such as those addressing the justified use of force upon another person generally (ORS 161.205); the justified use of physical force upon a person in defense of another person (ORS 161.209) and ORS 161.215); the justified use of deadly force in defense of a person (ORS 161.219); the justified uses of force to defend

premises (ORS 161.255) and property (ORS 161.229); the justified uses of force in conjunction with arrests (ORS 161.235-.265); and the general justification of otherwise illegal conduct performed in order to execute supervening legal duties (ORS 161.195), no Oregon statute addresses the particular Choice of Evils faced by petitioner in the instant case. There is, therefore, no legislative foreclosure in this case of the defense afforded by ORS 161.200.

The only statutory provision which, though not specifically dispositive of petitioner's dilemma, offers some guidance as to values which may properly be considered by the trier of fact in its balancing of imminent harm to animal life against potentially criminal wrongdoing is ORS 811.180 (formerly ORS 487.560). ORS 811.180(1)(a) provides that "an injury

or immediate threat of injury to a human being or animal, and the urgency of the circumstances" constitute an affirmative defense to an individual's driving while his or her license is suspended or revoked. (Emphasis added). Through ORS 811.180(1)(a), the Oregon legislature clearly indicated that within the process of balancing competing values in a Choice of Evils analysis, there is a place for the valuation not only of human life, but of animal life, as well. Thus, by no means is the availability of the Choice of Evils defense lessened in the instant case by the fact that the conduct with which petitioner is charged was motivated by a belief in the sanctity of animal life. Moreover, that the crimes charged in this case are felonies, or forcible in nature, does not deprive petitioner of the protections of ORS 161.200, as the statute is not limited

in its application to any class or description of offenses.

To the contrary, examples of proper applications of ORS 161.200 cited by its drafters included acts as destructive as the blasting of buildings and forced entry into an unoccupied house. 1971 Criminal Law Revision Commission Commentary, page 20 (Oregon District Attorneys' Association, December, 1975). Along similar lines, the drafters of the Model Penal Code precursor to ORS 161.200 stated that:

> "We see no reason why the scope of the defense ought to be limited to cases where the evil sought to be avoided is death or bodily injury or any other specific harm; nor do we see a reason for excluding cases where the actor's conduct portends a particular evil, such as homicide. The principle involved is one of general validity."

Page 7, Commentary to Sec. 3.02 of A.L.I. Model Penal Code, Tentative Draft No. 8 (1958).

Further evidence that petitioner's asserted Choice of Evils defense under ORS 161.200 is not inconsistent with any other provision of law can be seen by reference to various provisions of Oregon state law relating to the treatment of animals. ORS 167.310 et seq. For example, the lack of post-operative care to primates in a laboratory facility clearly would constitute a failure to provide "minimum care" under ORS 167.310(2)(d). As part of petitioner's proffer evidence of that as well as inadequate housing of primates was adduced. ORS 167.310(2)(e). Frankly, when taken in its totality, petitioner's proffered evidence made a prima facie case of Animal Neglect in the First and Second Degrees. ORS 167.325 and 330. Further reference may be had to various provisions of federal regulations concerning the

provisions of veterinary care for research animals. See, e.g., 9 C.F.R. § 3.84(a)(b).

Implicit in the reasoning of the Oregon court is its fundamental decision to restrict the applicability of the Choice of Evils defense in instances analogous to petitioner's to those in which the conduct complained of by petitioner is illegal. Such is contrary to the clear legislative history and intent of the drafters of ORS 161.200 and amounts to an arbitrary and unreasonable restriction upon the exercise of petitioner's fundamental right to present a defense in a jury trial. In support of this impermissible premise, the Oregon court in petitioner's case reasoned as follows:

> "The decisive question, however, is whether defendant's use of the defense here would be 'inconsistent * * * with some other provision of law.' State v. Clowes, supra, ____ Or App at _____. Extensive federal regulations govern

> the treatment of animals used in the experiments that the laboratories were performing. See 9 CFR § 3.1 et seq. For this purpose, regulations authorizing conduct have the same effect as statutes authorizing conduct. Although defendant alleges in his brief that the laboratory that he helped to raid was violating several regulations, he does not point to any evidence in the record that would support those allegations. Accordingly, federal law expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong."

Supra, Appendix D, page 4. In a similar fashion, in the Clowes decision, the Oregon Supreme Court, in pertinent part, reasoned as follows:

> "Let us now turn to ORS 161.200. To determine whether the choice of evils defense set forth in ORS 161.200 is available to defendants in this case, we must first decide whether to permit its use by them would, in the words of subsection (1), be 'inconsistent * * * with some other provision of law,' as that phrase has meaning in the context of ORS 161.200(1). If allowing the defense would be

'inconsistent with some other provision of law,' it may not be asserted. If not, then the availability of the defense is dependent upon whether the other preconditions to its use set forth in ORS 161.200 are satisfied.

"The phrase 'inconsistent with some other provision of law' is not defined in the statute. It is appropriate, therefore, to examine legislative history surrounding the enactment of ORS 161.200 for clues to that phrase's meaning.

"ORS 161.200 was enacted as section 20 of the 1971 revision to the Oregon Criminal Code. The commentary to the Proposed Oregon Criminal Code Section 20 states that it was derived from Model Penal Code Section 3.02, New York Revised Penal Law Section 35.05(2) and proposed but not enacted Michigan Revised Criminal Code Section 605. Subsection (1) of ORS 161.200 is substantially similar to the proposed Michigan statute. Under the proposed Michigan statute, the defense is available '[u]nless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law.' (Emphasis added.) Proposed Michigan Revised Criminal Code Section 605(1). The Model Penal

Code counterpart permitted the defense if:

> "'(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> "'(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> "'(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.'

Model Penal Code Section 3.02(1) (1962) Official Draft.

"The New York statute makes the defense available '[u]nless otherwise limited by the ensuring provisions of this article defining justifiable use of physical force[.]' New York Penal Law Section 35.05(2).

"There is little in the legislative history of ORS 161.200 that helps us to discern what the legislature

intended by the broad language 'inconsistent * * * with some other provision of law.' It is apparent, however, that that language is more restrictive than its New York counterpart. It also is clear, as the majority of the Court of Appeals said, that the phrase 'inconsistent * * * with some other provision of law,' as used in the Oregon statute, does not 'mean[] the same thing as § 3.02(1)(c) of the Model Penal Code. ORS 161.200(1) does not require, as does the Model Penal Code, an express legislative foreclosure of the defense; it requires only that the defense be inconsistent with some other provision of law.' State v. Clowes, supra, 100 Or App at 272.

"In City of St. Louis v. Klocker, 637 SW 2d 174 (Mo App 1982), three defendants were charged with trespass after they had entered an abortion clinic, attempted to dissuade patients from having abortions by detailing their physical and psychological dangers, and blocked access to the procedure rooms by sitting in a doorway. At the trial on charges of trespassing, they raised the statutory affirmative defense of necessity. The defendants contended that the injury avoided by their conduct was the 'killing of human life' by the abortions

of unborn fetuses. The Missouri Court of Appeals ruled as a matter of law that the defense was not available to the defendants. The court stated, inter alia, that the Missouri statute [§ 563.026 RSM 1978] provides that necessity is available as a defense only if it is not '"inconsistent * * * with some other provision of law."' Id. at 177. The Missouri court interpreted that language to 'simply mean[] that the legislature's decision prevails if and when it makes specific value choices,' and that '"competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of justification[.]"' Id. The court found that the Missouri legislature had made specific value choices in the area of abortion.

"We believe that the interpretation given by the Missouri court captures the essence of what the Oregon legislature intended by its conscious choice to include the broad language 'inconsistent * * * with some other provision of law' in ORS 161.200(2). The Oregon legislature made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right

> to terminate her pregnancy and enacted law that assumes abortions will be performed. Here, the actions that defendants sought to prevent were actions permitted under Oregon law. The interests that defendants seek to vindicate are not, therefore, consistent with that legislative decision. The present state of Oregon law is that a decision to terminate a pregnancy is a matter between a pregnant woman and her doctor. Hence, the defense of choice of evils, ORS 161.200, is unavailable to defendants in this case because it is, in the words of the statute, 'inconsistent * * * with some other provision of law.' ORS 161.200(1)."

State v. Clowes, supra, at 696-698 (Appendix F).

In petitioner's case, by analogy and direct reference to Clowes, supra, the Oregon court finds petitioner's asserted defense of Choice of Evils inconsistent with federal regulations regarding research animals. Simply stated, the Oregon court is plainly in error. The mere existence of a federal regulatory scheme, such as that

as described in the Animal Welfare Act, 7 U.S.C. § 2131ff, does not preempt petitioner's use of a state Choice of Evils defense for challenging activities generally regulated by a federal scheme. Moreover, the Animal Welfare Act contains no requirements as to "design, outline, guidelines, or performance of actual research or experimentation by a research facility." 7 U.S.C. § 2143. Consequently, it may not be claimed that there is federal approval for any particular experimental procedures undertaken at the University of Oregon animal laboratories. Rather, that is properly a factual decision to be made by a jury, pursuant to ORS 161.200. This court is also referred to the special concurring opinion of Judge Rossman in the Oregon Court of Appeals opinion in State v. Clowes, 100 Or. App. 266, 278-283 (1990) in which the author registers serious concern

with the majority's rationale for exclusion of the Choice of Evils defense because abortion is neither a "public or private injury" under the statute. The Justice properly suggests that such reasoning would lead to the withdrawal of this defense from defendants for whom it was meant to be available. By analogy, the reasoning of the Oregon court in petitioner's case is similarly flawed.

IX. CONCLUSION

In order to vindicate petitioner's fundamental constitutional rights assured under the Sixth and Fourteenth Amendments to the United States Constitution,

petitioner respectfully urges this Court to grant his petition for certiorari.

DATED this 8TH day of MAY, 1991.

Respectfully submitted,

STEPHEN A. HOUZE
Attorney for Petitioner

FILED
MAY 9 1991
OFFICE OF THE CLERK

No. 90-1746

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

ROGER SMITH TROEN, Petitioner

v.

STATE OF OREGON, Respondent

ON WRIT OF CERTIORARI TO
THE SUPREME COURT
OF THE STATE OF OREGON

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

Case No. 10-87-03558

THE STATE OF OREGON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	ORDER
	)	
ROGER SMITH TROEN,	)	DA Case
	)	No. 87-546
Defendant	)	

THIS MATTER HAVING COME BEFORE THIS COURT on the State's Motion to Limit the Introduction of Evidence pertaining to the defense of Choice of Evils as codified in ORS 161.200; and the State appearing by and through Lane County Assistant District Attorney Frank R. Papagni, Jr., and the defendant appearing personally and by and through his attorney, Stephen A. Houze; and the Court having considered the memoranda

filed by the parties, evidence in the form of testimony, exhibits and representation, and the arguments of the parties; and being fully advised;

IT IS HEREBY THE FINDINGS OF THIS COURT THAT:

The representations and evidence offered by the parties are accepted as true.

A trial court may exercise its discretion under ORS 135.037 to conduct a pretrial omnibus hearing in order to rule on the State's Motion to Limit the Introduction of Evidence regarding the defense Choice of Evils. State v., Hund, 76 Or App 89, 708 P2d 621 (1985), pet. for review den., 300 Or 477 (1986); State v. Whisman, 33 Or App 147, 575 P2d 1005 (1978).

The defendant's offer of proof was considered in its entirety by this Court; and the State's arguments based on Smith v. White, 213 Or 425, 435, P2d (1962); State v. Howard, 49 Or App 391, 619 P2d 943 (1980) are rejected.

The legal issue presented was whether the evidence the defendant was allowed to present in his offer of proof was relevant to prove the Choice of Evils defense. OEC 401, ORS 40.150; ORS 161.200.

Evidence presented by the defendant's offer of proof was irrelevant and inadmissible in a judicial forum, and would have been more appropriate presented in legislative or executive forums.

The defendant committed these crimes because he disagreed with

policies and activities pertaining to animal research at the University or Oregon. The facts seem to fit precisely within the exclusion of ORS 161.200(2). As a matter of law, a person in our society cannot commit crimes only because that person disagrees with what is lawfully taking place in some other part of our society. State v. Hund, supra. See also United States v. Dorrell, 758 F2 427 (9th Cir. 1985). Therefore, pursuant to ORS 161.200(2), the defendant is not entitled to rely upon a Choice of Evils defense.

There is no doubt as to the good faith of the defendant's concern for animal's welfare; but the defendant's offer of proof contains no evidence that the animals were in any better condition after they were stolen or

"liberated" from their owners. The defendant's complete failure to provide any evidence showing that his criminal actions actually prevented a threatened greater harm, both logically and legally, prevents the introduction of a Choice of Evils defense before the trier of fact.

The defendant further failed to offer any evidence legally justifying the extensive damage done to the facilities and equipment at the University of Oregon during the commission of the Burglary. Therefore, as pertaining to Count I, CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE and Count II, BURGLARY IN THE SECOND DEGREE, there is no evidentiary basis to allow the defendant to present a Choice of Evils defense.

The defendant has also failed to offer any relevant evidence which would satisfy any of the statutory requirements set forth in ORS 161.200. Specifically, the defendant's offer of proof failed to present any evidence that: (1) the defendant's conduct was necessary to avoid the threatened injury; (1) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the need to avoid injury was greater than the need to avoid the injury which the statute sought to prevent. State v. Matthews, 30 Or App 1133, 1136, 569 P2d 662 (1977).

Further, the proffered evidence is irrelevant and inadmissible as proof of the defendant's "state of mind" as

pertaining to a defense of Choice of Evils.

This Court accepts, adopts and incorporates the factual representations, arguments and briefs presented by the State as part of its findings, except as previously stated in this Order.

IT IS THEREFORE THE ORDER OF THIS COURT that none of the evidence submitted by the defendant in his offer of proof is admissible before the trier of the fact in support of a defense of Choice of Evils. The State's Motion to Limit the Introduction of such evidence is allowed.

DATED this 4th day of February, 1988.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT COURT JUDGE

Submitted by:
Frank R. Papagni, Jr., OSB #76268
Assistant District Attorney

APPENDIX B

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OF OREGON, Plaintiff,	Case No. 10-87-03558
vs.	SENTENCE AND ORDER OF PROBATION
ROGER SMITH TROEN, Defendant.	

NOW on the 23rd day of March, 1988, this cause came on to be heard, the State of Oregon being represented by Frank R. Papagni, Assistant District Attorney for Lane County, Oregon and the defendant, Roger Smith Troen, appearing in person, and being represented by his attorney, Stephen A. Houze, said defendant having been indicted by the Lane County Grand Jury and having been duly arraigned upon charges of CONSPIRACY TO COMMIT BURGLARY IN THE

SECOND DEGREE (Count I); BURGLARY IN THE SECOND DEGREE (Count II); and THEFT IN THE FIRST DEGREE (Count III) and having been duly tried and convicted of said crimes before the Court in the above entitled court and cause on the 21st day of January, 1988, and this being the time fixed for imposing sentence herein, and the court being fully advised,

THE COURT FINDS, that for the purpose of imposing sentence herein, that the crimes charged in Count I and Count III of the Indictment (CONSPIRACY TO COMMIT BURGLARY IN THE SECOND DEGREE AND THEFT IN THE FIRST DEGREE) merges with Count II of the Indictment, "BURGLARY IN THE SECOND DEGREE", and

PURSUANT TO CHAPTER 725 Oregon Laws, 1983, the defendant, Roger Smith Troen, is assessed the sum of $50; and

IT IS CONSIDERED, ORDERED, AND ADJUDGED, that the defendant, Roger Smith Troen, be and he is hereby sentenced to pay restitution in the sum of $34,912.96; and

IT IS FURTHER ORDERED, that the defendant, Roger Smith Troen, be and he is hereby placed on probation to the Corrections Division for a period of five (5) years from the date hereof, upon and subject to the General Conditions provided by ORS 137.540, which are attached hereto and 2incorporated herein, and upon the following Special Conditions: 7A, 7B, 12, 14A, 14B, 14D and 14E of the Conditions of Supervision of the

Corrections Division, State of Oregon, which is attached hereto and incorporated herein.

DATED and signed this 23rd day of March, 1988.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT JUDGE

COURT REPORTER:

Judy Roberts

CORRECTIONS DIVISION
FIELD SERVICES - PROBATION
CONDITIONS OF SUPERVISION

County LANE DOCKET# 10-87-03558

I. GENERAL:

The Court may place the defendant on probation, which shall be subject to the following General Conditions unless specifically deleted by the Court (ORS 137.540). The Probationer shall:

1. Remain under the supervision and control of the Probation Department.
2. Abide by the direction of the Probation Department and its representatives.
3. Promptly and truthfully answer all reasonable inquiries of the Probation Officer relating to probation performance.

4. Truthfully report monthly at times and in the manner specified by the Probation Department or its representative.

5. Remain in the State of Oregon until written permission to leave is granted by the Probation Department or its representatives.

6. Find and maintain gainful full-time employment, approved schooling, or a full-time combination of both. Any waiver of this requirement must be based on finding by the Court stating the reasons for the waiver.

7. Change neither employment nor residence without promptly informing the Probation Department or its representatives.

8. Permit the Probation Officer to visit the probationer or the probationer's residence or worksite.

9. Submit to fingerprinting or photographing, or both, when requested by the Probation Department for supervision purposes.

10. Obey all laws, municipal, county, state and federal. (The Federal Gun Law of 1968 prohibits any person convicted of a crime punishable as a felony the use or possession of a firearm.)

11. Pay fines, costs including probation costs, attorney fees or restitution or any combination thereof ordered by the Court on a

schedule of payments determined by the Court.

II. SPECIAL CONDITIONS

In addition, the following indicated Special Conditions are imposed for the protection of the public or reformation of the offender. The undersigned Probationer shall:

_____ 1. Be confined to the county jail for a period not to exceed _____ _____.

_____ 2. Submit to polygraph examination by qualified polygraph examiner designated by the Court or Probation Officer under terms and conditions set by the Court.

_____ 3. Enroll, participate and successfully complete_____

_____

(designated residential treatment programs for drug, alcohol, or mental health.)

_____ 4.A Abstain from the use of intoxicants.

_____ 4.B Not use intoxicants to excess. (The excessive use of intoxicants is understood to mean that the effects disrupt or interfere with domestic life, employment or proper community conduct.)

_____ 5. Submit to random urinalysis at the direction of Probation Officer.

_____ 6. Refrain from knowingly associating with persons who use or possess controlled substances illegally, or from requesting places where such substances are kept or sold.

__X__ 7. Refrain from knowingly associating with:

__X__ A. Codefendants or crime partners.

__X__ B. Persons known to be engaged in criminal activities.

_____ C. Persons under age ___ except under specific circumstances specified in writing by the Court or Probation Officer.

_____ D. Other designated person_____

_____

_____ 8. Undergo medical, psychological or therapy treatment.

_____ 9. Take Antabuse, if medically approved.

_____10. Submit to breath test or blood test to determine blood alcohol content upon request of Probation Officer having reasonable grounds to believe the results would disclose evidence of probation violation. (This condition may be set when it is reasonably related to the mature of the offense or treatment of the offender.)

_____11. Neither own, possess nor control any firearm or any other specified weapon:_____

__X__12. Submit person, residence, vehicle, and property to search by a Probation Officer, having reasonable grounds to believe such search will disclose evidence of probation violation. (This condition may be set when it is reasonably related to the nature of the offense or treatment of the offender.)

_____13. Report to_____ (Any state or local mental health facility) for evaluation, and if medical, psychiatric or psychological treatment is

recommended, cooperate with and accept the treatment of the facility.

X 14. Other SpecialConditions:

A. that the defendant shall pay the restitution he has been sentenced to pay herein the sum of $34,912.96 at the rate of not less than $150 per month. First payment shall be paid on or before May 1, 1988 and a like sum of $150 shall be paid on or before the 1st day of each successive month thereafter until total restitution shall be paid. To be paid to the Court Clerk; shall be fully paid on or before 5 years from the date hereof, who shall pay the same over to the University of Oregon.

B. That the defendant shall pay a probation supervision fee of $15 per month as directed by his probation officer.

C. That the defendant shall serve 90 days home detention, utilizing the ankle bracelet monitoring program and agree to the program rules, including paying any fees required, as established by the Corrections Division.

D. That the defendant shall perform Community Service of 250 hours; at not less than 50 hours per year.

E. Defendant shall not associate with the Animal Liberation Front or/any of its members. Failure to abide by all General and Special

Conditions imposed by the Court and supervised by the Probation Department and its representatives may result in arrest and revocation of probation and will result in notification of the violation to the sentencing Court. The Court may at any time modify the conditions of Probation.

March 23, 1988 /s/ Hon. Edward E. Allen
Date Judge Hon. Edwin E. Allen

I understand and accept the conditions of Probation under which I have been released by the sentencing Court. I agree to abide by and conform to them and fully understand my failure to do so may result in the revocation of my probation by the Court.

_____ _____
Date Signature of Person Under Probation

_____ _____
Reviewed with Supervising Officer Date

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

THE STATE OR OREGON,	)	
	)	Case No. 10 87
Plaintiff,	)	03558
	)	
vs.	)	ORDER MODIFYING
	)	SENTENCE AND
ROGER SMITH TROEN,	)	ORDER OF
	)	PROBATION
Defendant.	)	

THIS MATTER having come before the Court this date on the Court's own Motion and upon the recommendation of Nikki Finley, Parole and Probation Officer, Corrections Division, State of Oregon; and

IT APPEARING TO THE COURT that one of the Defendant's terms of probation contained in the Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988, is that, "Defendant shall not associate with the Animal Liberation Front or any of its

members."; and the court having been advised by Nikki Finley, Defendant's Probation Officer, that the Animal Liberation Front is an underground organization and that the members are unknown which makes this condition of probation unenforceable; now, therefore,

it is hereby

ORDERED that the condition of probation contained in the Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988, wherein Defendent "shall not associate with the Animal Liberation Front or any of its members" be and the same hereby is deleted from the Sentence and order of Probation heretofore referred to; and it is further

ORDERED that said Sentence and Order of Probation made and entered herein on the 23rd day of March, 1988 heretofore referred to, shall remain in full force and effect except as specifically modified herein.

DATED and signed this 15th day of January, 1991.

/s/ Edwin E. Allen
EDWIN E. ALLEN
CIRCUIT JUDGE

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON,

Respondent,

v.

ROGER SMITH TROEN,

Appellant.

(10-87-03558; CA A48068)

Appeal from Circuit Court, Lane County.

Edwin E. Allen, Judge.

Argued and submitted April 17, 1989.

Stephen A. Houze, Portland, argued the cause for appellant. With him on the brief was Birkland & Houze, Portland.

Janet Klapstein, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Before Graber, Presiding Judge, and Riggs and Edmonds, Judges.

GRABER, P.J.
Affirmed.

5585N FILED: February 14, 1990

DESIGNATION OF PREVAILING PARTY AND ALLOWANCE OF COSTS

Case Name: State v. Troen

Appellate case number: CA A48068

Trial court or agency case number: 10-87-03558 (C)

Prevailing party or parties: Respondent.

[ ] No costs allowed

[ ] Costs allowed to the prevailing party or parties, payable by:

In a criminal, post-conviction relief, habeas corpus, juvenile or other case in which a party may be represented by appointed counsel entitled to compensation under ORS 138.500, if the prevailing party is a private party and represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

* * * * * * * * * * *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $_____, and attorney fees in the amount of $_____ (ORAP 11.03, 11.05, and 11.10.)

IT IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $_____ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS 21.605.

Date Supreme Court denied review: Dec. 4, 1990

DATED: Jan. 9, 1991 COURT OF APPEALS
(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). See also ORS 19.190(1).

GRABER, P.J.

Defendant, an animal rights activist, appeals from convictions[1] for crimes arising from a break-in at a University of Oregon research facility and the theft of laboratory animals. He assigns as error the allowance of the state's pretrial motion to limit the evidence that he proposed to introduce in support of a "choice of evils" defense. ORS 161.200.[2] We affirm.

Before trial, the state filed a motion that sought to preclude defendant from offering evidence on his choice of evils defense. In the pretrial hearing, the trial court required defendant to present his evidence. He argues that the trial court (1) abused its discretion in requiring him to present his evidence before trial, (2) erred by not restricting its rulings regarding the proffered

evidence to relevancy and other general grounds of admissibility, and (3) usurped defendant's right to have a jury hear his defense, because it rejected the defense on its merits.

A motion to limit evidence may be considered in a pretrial omnibus hearing under ORS 135.037(3). State v. Marbet, 32 Or App 67, 573 P2d 736 (1978). We rejected an argument similar to defendant's in State v. Whisman, 33 Or App 147, 575 P2d 1005 (1978). See also State v. Clowes, ___ Or App ___, ___ P2d ____ (January 24, 1990). Generally, a trial court should make a pretrial ruling on the admissibility of evidence only if the evidence carries an unusual potential for prejudice. State v. Browder, 69 Or App 564, 567, 687 P2d 168, rev den 298 Or 172 (1984). Here, the proffered evidence included, in defendant's words,

> "graphic photographic evidence of research practices and abuses, [and] graphic video-taped documentaries of other similar research practices and animal abuses * * *."

The nature of the evidence was such that the trial court did not abuse its discretion in ruling on its admissibility before trial.

Defendant argues that the pretrial ruling excluding the evidence abrogated his rights under Article I, section 11, and the Fourteenth Amendment to present a defense. The short answer is that the right to present a defense is subject to the requirements that the defense be one that the law recognizes and that it be proven by admissible evidence. See Washington v. Texas, 388 US 14, 23, 87 S Ct 1920, 18 L Ed 2d 1019 (1967); see also State v. Douglas, 292 Or 516, 533 n 17, 641 P2d 561 (1982) (Lent, J., specially concurring: "The

defendant's right to present a defense is subject to legal requirements, such as that evidence must be relevant and material"); State v. Holterman, 69 Or App 509, 687 P2d 1097, rev den 298 Or 172 (1984).

Defendant's second argument is that the trial court, in its pretrial ruling, went beyond determining a minimal threshold of relevancy and weighed the sufficiency of the evidence. In order to present a jury question regarding the choice of evils defense, a defendant must offer evidence that would be sufficient for a jury to find that: (1) the defendant's conduct was necessary to avoid a threatened injury; (2) the threatened injury was imminent; and (3) it was reasonable for the defendant to believe that the need to avoid that injury was greater than the need to avoid the injury that the charging statute seeks to prevent. State v. Matthews, 30 Or App

1133, 1136, 569 P2d 662 (1977). When a defendant raises the choice of evils defense, the trial judge must determine whether the evidence satisfies those requirements before the court can submit the issue to a jury. If there is evidence from which the jury could find that each requirement has been met, then the court must submit the defense. It is for the jury to determine the weight of the evidence and to decide whether the defense has been established. Contrary to defendant's argument, the trial court correctly understood its role.

Next, defendant asserts that the court erred in failing to submit the defense, because the evidence that he offered was sufficient to raise a jury question. He contends that his evidence showed that laboratory animals were being subjected to cruel and inhumane testing procedures and

that it was therefore necessary for him and his accomplices to break into the laboratories in order to protect the animals.

The decisive question, however, is whether defendant's use of the defense here would be "inconsistent * * * with some other provision of law." State v. Clowes, supra, ____ Or App at _____. Extensive federal regulations govern the treatment of animals used in the experiments that the laboratories were performing. See 9 CFR § 3.1 et seq. For this purpose, regulations authorizing conduct have the same effect as statutes authorizing conduct. Although defendant alleges in his brief that the laboratory that he helped to raid was violating several federal regulations, he does not point to any evidence in the record that would support those allegations. Accordingly, federal law

expressly allows what the victim of the crime was doing, so defendant may not offer a choice of evils defense when he interfered with that activity because of his belief that what the laboratory was doing is morally wrong.

Finally, defendant argues that the proffered evidence was admissible as evidence of his motive in participating in the burglary and theft. He relies on State v. Miller, 137 Or 218, 2 P2d 8 (1931), for the proposition that, although proof of motive is not ordinarily essential, evidence showing a motive or its absence is always admissible. In the trial court, he argued that his evidence was admissible to show his state of mind or what he intended. For the purposes of deciding this issue, we assume that defendant's concepts of "state of mind" and "motive" are synonymous.

Defendant was charged with "intentionally" conspiring to commit the crime of burglary and "knowingly" committing the crimes of burglary and theft. ORS 161.085 provides these definitions:

> "(7) 'Intentionally' or 'with intent,' when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.
>
> "(8) 'Knowingly' or 'with knowledge,' when used with respect to conduct or to a circumstance described by a statute defining an offense, means that a person acts with an awareness that the conduct of the person is of a nature so described or that a circumstance so described exists."

OEC 401 defines "relevant evidence" as

> "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Defendant's proffered evidence was not relevant to the issue of whether he acted "with intent" to conspire to commit the crime of burglary or "knowingly" in committing the crimes of burglary and theft. Defendant's motive, that is, why he did what he did, is immaterial to the allegations that he acted with a conscious objective to commit burglary or with an awareness that his conduct constituted burglary or theft. In State v. Miller, supra, the reason why the defendant, a police officer, released those whom he had arrested was essential to his defense to a charge that he had done so as the result of a bribe. In this case, in contrast, why defendant did what he did has nothing to do with whether he acted intentionally or knowingly. The issue was whether defendant acted with a particular state of mind, not why he had that mental state. The

proffered evidence would not tend to show that defendant did not know what he did or intend to do it. The court, therefore, did not err in excluding it.

Affirmed.

FOOTNOTES

1

Defendant was convicted of theft in the first degree, burglary in the second degree, and conspiracy to commit burglary in the second degree. ORS 164.055; ORS 164.215; ORS 161.450.

2

ORS 161.200 provides:

> "(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:
>
> "(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and
>
> "(b) The threatened injury is of such gravity that, according to

ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

"(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of cases arising thereunder."

APPENDIX E

IN THE SUPREME COURT OF THE STATE OF OREGON

OREGON STATE OF Respondent/ Respondent	)	
	)	ORDER DENYING
	)	REVIEW
v.	)	
	)	CA A48068
TROEN ROGER SMITH	)	SC S37075
Appellant Petitioner	)	
	)	

The Court has considered the petition for review and ORDERS that it be denied.

DATE: December 4, 1990

/s/ Edwin J. Peterson
EDWIN J. PETERSON
CHIEF JUSTICE

Graber, J., not participating

COPIES TO:

KLAPSTEIN JANET A	Attorney for Respondent/ Respondent
HOUZE STEPHEN A	Attorney for Appellant Petitioner

APPENDIX F

IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON
Respondent on Review,
v.
BRIAN WOODBRIDGE CLOWES
Petitioner on Review.
(DA 372447-8806; CA A50128 (Control);
SC S36922)

STATE OF OREGON,
Respondent on Review,
v.
JUDY LOIS HAGER,
Petitioner on Review.
(DA 372448-8806; CA A50129; SC S36946)

STATE OF OREGON,
Respondent on Review,
v.
MICHAEL JAMES KINSEY,
Petitioner on Review.
(DA 372450-8806; CA A50132; SC S36933)

STATE OF OREGON,
Respondent on Review,
v.
RACHEL A. WOLCOTT,
Petitioner on Review.
(DA 372446-8806; CA A50136; SC S36946)
(Cases Consolidated)

On review from the Court of Appeals*

Argued and submitted June 6, 1990.

Richard L. Stradley, Hillsboro, argued the cause and filed the petition for petitioner on review Brian Woodbridge Clowes.

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*Appeal from Multnomah County District Court, William J. Keys, Judge, 100 Or App 266, 785 P2d 1071 (1990)

Norman L. Lindstedt, Lindstedt & Buono, P.C., Portland, argued the cause and filed the petition for petitioners on review Judy Lois Hager and Rachel A. Wolcott.

William E. McCann, Tillamook, argued the cause and filed the petition for petitioner on review Michael James Kinsey.

Janet Klapstein, Assistant Attorney General, Salem, argued the cause for respondent on review. With her on the response brief were Dave Frohnmayer, Attorney General, and Virginia L. Linder, Solicitor General, Salem.

Melanie E. Mansell, Sheridan, filed a brief amici curiae on behalf of The Rutherford Institute, Charlottesville, Virginia.

Before Peterson, Chief Justice, and Carson, Gillette, Van Hoomissen, Fadeley, and Unis, Justices.

UNIS. J.

The decision of the Court of Appeals is affirmed. The judgment of the Multnomah County District Court is affirmed.

UNIS, J.

The question presented in this case is whether the statutory defense of choice of evils, ORS 161.200,[1] is available to anti-

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[1]ORS 161.200 provides:

"(1) Unless inconsistent with other provisions of chapter 743, Oregon Laws 1971, defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when:

"(a) That conduct is necessary as an emergency measure to avoid an imminent public or private injury; and

"(b) The threatened injury is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.

"(2) The necessity and justifiability of conduct under subsection (1) of this section shall not rest upon considerations pertaining only to the morality and advisability of the statute, either in

abortionists who were charged with criminal trespass in the second degree, ORS 164.245,[2] after they had entered the premises of an abortion clinic, attempted to prevent patients who were in the first trimester of pregnancy from having abortions, blocked access to the clinic by sitting in the doorways, and refused to leave when asked. We hold as a matter of law that the defendants are not entitled to assert the choice of evils defense.

Lovejoy Surgicenter (the clinic) is a

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[1]cont.
its general application or with respect to its application to a particular class of cases arising thereunder."

[2]ORS 164.245 provides:

"(1) A person commits the crime of criminal trespass in the second degree if the person enters or remains unlawfully in or upon premises.

"(2) Criminal trespass in the second degree is a Class C misdemeanor."

clinic that performs abortions. On June 18, 1988, defendants were arrested and charged with criminal trespass in the second degree for the conduct described above. Defendants entered not guilty pleas, requested jury trials, and gave timely notice of their intent to rely on the statutory defense of choice of evils, ORS 161.200.

The state filed a motion *in limine* to exclude any evidence of the defense. At a pretrial hearing, defendants made an offer of proof on the evidence it sought to present to the jury. Defendants contended that their violation of the criminal trespass law was an emergency measure that was necessary to avoid the imminent death of unborn children. The evidence at the pretrial hearing showed, *inter alia*, that 19 abortions were scheduled at the clinic on June 18, 1988, and that all of the

patients were within the first trimester, ranging from 6 to 11 weeks of gestation.[3] There was evidence offered by defendants in the form of expert opinion testimony that life begins at the time of conception. There also was evidence to support defendants' assertion that each abortion involved the taking of a human life. There was no evidence that the women who were to have abortions on the day of defendants' trespass were doing so other than voluntarily or that those who were to perform abortions were compelled to participate. Defendants do not assert that the clinic was unlicensed or otherwise failed to comply with any applicable law.

The trial court found that defendants

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[3]Also scheduled at the clinic that day was one second trimester pregnancy at 22 weeks of gestation, in which the patient had AIDS. The trial court elected not to rely on the AIDS case as a basis for its decision. We do not consider it here.

had proffered sufficient evidence on all the elements of the choice of evils defense, generally, to submit it to the jury. Nevertheless, the trial court granted the state's motion to exclude evidence of the defense on the ground that to admit such evidence would be inconsistent with Roe v. Wade, 410 US 113, 93 S Ct 705, 35 LEd2d 147 (1973).[4] Because of the trial court's ruling, defendants withdrew their request for a jury trial and proceeded to a court trial on stipulated

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[4]Although the record is not entirely clear, it appears that the trial court concluded that allowing defendants to avail themselves of the statutory choice of evils defense would constitute state action, by which the state would be sanctioning defendants' interference with the pregnant women's federal constitutional privacy rights as recognized in Roe v. Wade, 410 US 113, 93 S Ct 705, 35 L Ed2d 147 (1973), and subsequent cases.

facts. The trial court found defendants guilty.[5]

Defendants appealed from the resulting judgment. The Court of Appeals, in an in banc decision, affirmed. State v. Clowes, 100 Or App 266, 785 P2d 1071 (1990). A majority of that court held:

> "The present state of Oregon law is that a woman's decision to have an abortion is left to her and her physician. See ORS 435.435 et seq. To permit defendants to prevent or interfere with that freedom of choice would be inconsistent with the 'other provisions of [Oregon law.' It is clear from the legislative action that no interference with a woman's choice to have an abortion is to be tolerated, and, therefore, the [choice of evils] defense is unavailable. ORS 161.200(1)."

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[5]Defendants were charged and tried separately. As a matter of judicial economy, the trial court allowed each defendant to join the legal and factual assertions of the other defendants in the pretrial proceeding. In this court, as in the Court of Appeals, the cases of the named defendants are consolidated for argument and decision.

Id. at 274. Judge Graber, in a specially concurring opinion, agreed that the choice of evils defense was not available to defendants, but for different reasons. She "would hold as a matter of law * * * that an abortion is not [a 'public or private injury' as those terms have meaning in the context of ORS 161.200(1)(a)]." Id. at 276. Judge Graber also stated that "[d]efendants base their choice of evils defense on the assertion that the criminal trespass statutes should not apply to their protest on moral grounds, against abortion[,]" and "[t]hat is exactly the kind of claim that ORS 161.200(2) forecloses." Id. at 278.

We allowed review to decide whether the choice of evils defense, sometimes referred to as the defense of necessity, is

available to defendants under the facts of this case.

Defendants first argue that "the trial court abuse[d] its discretion in relation to the motion in limine by requiring [them] to present the entirety of * * * [their choice of evils defense] evidence to the court in a pretrial offer of proof." We disagree.

Evidence which is not relevant is not admissible. OEC 402. The standard to be used in determining whether proffered evidence is relevant is supplied by OEC 401. That rule provides:

> "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Under OEC 401's relevancy standard, facts must be "of consequence to the determination of the action" (i.e.,

"material")[6] for them to be relevant. Whether or not facts are of consequence is determined not by the rules of evidence but by the pleadings and the substantive law. McCormick on Evidence 541, § 185 (3rd ed 1984). If under the substantive law the choice of evils defense is not available to defendants in this case, then evidence in support of that defense would not be "of consequence to the determination of the action" and, therefore, would be irrelevant, OEC 401, and inadmissible, OEC 402. The trial judge must decide, under OEC 104(1), whether the proffered evidence satisfies the minimum threshold of relevancy required by OEC 401, i.e., whether the proffered evidence (1) has any tendency to prove or disprove a fact (2)

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[6]OEC 401 subsumes the concept of materiality in the definition of relevance.

that is "of consequence to the determination of the action."

In State v. Foster, 296 Or 174, 183, 674 P2d 587 (1983), we expressly approved the use of a pretrial motion in limine to obtain a ruling on evidence before the evidence is sought to be introduced. See State v. McClure, 298 Or 336, 340, 692 P2d 579 (1984) (to the same effect). We recognized that one of the purposes of a motion in limine is to insulate the jury from exposure to harmful inadmissible evidence. State v. Foster, supra, 296 Or at 183. In this case, the trial court was well within its discretion when it required defendants to present evidence of their defense of choice of evils in a pretrial offer of proof.[7]

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[7]Requiring evidence in the form of an offer of proof may serve another purpose. In this case, the trial court was called upon to determine the meaning of a statute,

7 cont.
ORS 161.200, and to decide whether under that law defendants were entitled to introduce evidence in support of the defense of choice of evils. An offer of proof is an appropriate vehicle for supplying the court with facts and information to help it perform that task. Facts utilized by a court to "help [it] to determine the context of the law and policy and to exercise its judgment or discretion in determining what course of action to take" have been described as judicial notice of legislative facts. See Davis, Judicial Notice, 55 Colum L Rev 945, 952 (1955); Strong, Evidence, § 3.18 (Oregon CLE 1986); see also Chartrand v. Coos Bay Tavern, Inc., 298 Or 689, 693, 696 P2d 513 (1985).

> "[T]he term 'legislative' facts is not restricted to facts developed and relied upon by the legislature in the process of formulating statutory law, but extends to all facts utilized by the courts in determining what the law, either statutory or decisional, is or should be."

Cleary, Strong, Broun and Mosteller, Evidence, Cases and Materials 349 (4th ed 1988). Judicial notice of legislative facts is not governed by the provisions of OEC 201, and the limitations and standards of OEC 201 do not control notice of legislative facts. State v. Brown, 297 Or 404, 420, n 7, 687 P2d 751 (1984). We have recognized the distinctive nature of legislative facts in several cases. See,

Moreover, a review of the legislative history relating to the enactment of ORS 161.200 nowhere demonstrates that the trial judge may not determine in the first instance whether a defendant's evidence relating to the choice of evils defense is admissible. Rather, the history evidences a legislative intent to give the trial court discretion to hold a pretrial hearing to rule on the applicability of the defense. See Minutes, Criminal Law Revision Commission, November 7, 1969, pp 25-30, See also Commentary, Proposed Oregon Criminal Code 20, § 20 (1970).

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7 cont.
e.g., Chartrand v. Coos Bay Tavern, Inc., supra, 298 Or at 693-94 (court takes judicial notice of legislative facts when it takes notice of facts for the purpose of determining what the common law of this jurisdiction is or ought to be); State v. Brown, supra, 297 Or at 417, n 4 (court specifically points out facts judicially noticed, i.e., the inaccuracies of polygraph examination, were noticed to determine a rule of law regarding inadmissibility of polygraph results).

Defendants next contend that the trial court erred as a matter of law in excluding evidence in support of their choice of evils defense, ORS 161.200, thereby precluding them from arguing their only putative defense to the criminal trespass charge to the jury.

Before addressing that contention and examining ORS 161.200, which defines the contours of the choice of evils defense, a brief review of the recent history of Oregon legislation concerning abortion is helpful to an understanding of the legal issues presented in this case.

In 1969, the Oregon legislature enacted former ORS 435.405 et seq. Those statutes, which were based on Model Penal Code Section 230.3 (1962), see Comment, Abortion, Oregon Style, 49 Or L Rev 302 (1970), allowed an abortion when (1) there was "substantial risk that continuance of

the pregnancy [would] greatly impair the physical or mental health of the mother,"[8] (2) "[t]he child would be born with serious physical or mental defect,"[9] or (3) "[t]he pregnancy resulted from felonious intercourse."[10] After the 150th day, abortion was permitted only when "[t]he life of the pregnant woman [was] in imminent danger."[11] Under Oregon law, abortions could be performed only by licensed physicians in licensed hospitals.[12] Except in emergency cases,

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[8]Former ORS 435.415(1)(a)(repealed by Or Laws 1983, ch 470, § 1).

[9]Former ORS 435.415(1)(b)(repealed by Or Laws 1983, ch 470, § 1).

[10]Former ORS 435.415(1)(c)(repealed by Or Laws 1983, ch 470 § 1).

[11]Former ORS 435.445(1)(repealed by Or Laws 1983, ch 470, § 1).

[12]Former ORS 435.415(3); 435.405(2) and (3) (repealed by Or Laws 1983, ch 470, § 1).

two other physicians had to certify in writing the circumstances justifying an abortion.[13] There were record keeping and reporting requirements.[14] Assistance in self-abortion was unlawful.[15] With some exceptions, it was a crime to perform or aid in an abortion.[16] A doctor's license could be suspended or revoked for performing an abortion not permitted by Oregon law.[17] The limitations on abortion did not apply to "the prescription, administration, or distribution of drugs or

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[13]Former ORS 435.425(1); 435.445(1) (repealed by Or Laws 1983, ch 470, § 1).

[14]Former ORS 435.425; 435.435(2); 435.445(2); 435.495(1) (repealed by Or Laws 1983, ch 470, § 1).

[15]Former ORS 435.455(2) (repealed by Or Laws 1983, ch 470, § 1).

[16]Former ORS 435.455 (repealed by Or Laws 1983, ch 470, § 1).

[17]ORS 677.190 (amended by Or Laws 1983, ch 470, § 4).

other substances for avoiding pregnancy, whether by preventing implantation of a fertilized ovum or by any other method that operates before, at, or immediately after fertilization."[18] Oregon law required the written consent of the pregnant woman, or the written consent of a parent if she was an unmarried minor, or the written consent of her husband if she was married and living with her spouse.[19] Current Oregon law recognizes the right of an individual to refuse to participate in an abortion[20] and the right of private hospitals to deny use of their facilities for such purpose.[21]

In 1973, the Supreme Court of the

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[18]Former ORS 435.465 (repealed by Or Laws 1983, ch 470, § 1).

[19]Former ORS 435.435 (repealed by Or Laws 1983, ch 470, § 1).

[20]ORS 435.485.

[21]ORS 435.475.

United States handed down its landmark decisions in Roe v. Wade, supra, and Doe v. Bolton, 410 US 179, 93 S Ct 739, 35 L Ed 2d 201 (1973). In those opinions, the Supreme Court held that during the first trimester of pregnancy, the right of the woman to terminate her pregnancy is absolute. In the second trimester, a state may choose to regulate abortion procedures in ways that are reasonably related to maternal health. In the final trimester, the state may regulate abortion for the preservation of the life of the fetus. In Doe v. Bolton, supra, the Supreme Court struck down a Georgia statute that limited abortions in a manner similar in many respects to those provisions in former ORS Chapter 435, discussed above.

In 1973, a special three-judge panel of the United States District Court for the District of Oregon in Benson v. Johnson,

No. 70-226, slip op at ___ (DC Or Feb. ___, 1973), declared portions of former ORS Chapter 435 unconstitutional.[22] Following that decision, the Oregon Attorney General issued a letter of advice explaining which statutory provisions specifically were declared unconstitutional by the Benson court and which statutory provisions were rendered meaningless or affected by the decision. See Oregon Attorney General Letters of Advice (March 27, 1973).

A decade later, the Oregon Legislature enacted 1983 Oregon Laws, Chapter 470. That legislation repealed those Oregon

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[22]The sections declared unconstitutional were former ORS 435.415 (limitation of place and circumstances of abortion), former ORS 435.425 (physician certification and 150-day limitation), former ORS 435.435(1) (spousal or guardian consent), former ORS 435.425(2) and former ORS 435.435(2) (record keeping and reporting requirements), and former ORS 435.455 (criminal penalties for unauthorized abortions).

statutes that might inhibit or restrict a woman in obtaining an abortion, including those sections declared unconstitutional in Benson v. Johnson, supra. Only right of conscience provisions and certain record keeping requirements now remain on the books.[23] In addition, the Oregon legislature enacted a law that assumes abortions will be performed. No hospital operated by the state or a political subdivision may adopt a policy of excluding or denying admission to a woman seeking termination of pregnancy. ORS 435.475(3). At the time of defendants' trespasses, the Health Division by rule had established criteria for licensing termination of pregnancy hospitals. Former OAR 33-73-200 to OAR 33-73-255. Facilities where abortions are performed, for example, were

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[23]See ORS 435.475; 435.485; 435.496.

subject to state regulations as to what medical equipment must be available, depending on the stage at which the termination of pregnancy is to be performed. Id. Currently, OAR 333-71-000(1)(b)(A) and (1)(c)(A) establish procedures for outpatient surgery involving termination of pregnancy.

The above legislative history makes it clear that current Oregon law provides that the decision whether to terminate a pregnancy is left to the woman and her physician.[24]

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[24]Because, as previously discussed, Oregon does not prohibit voluntary and properly performed abortions, "the conclusion that those involved had a right to seek and perform the contemplated abortions does not depend on the [United States] Supreme Court's holding in Roe v. Wade, supra. If Oregon law did prohibit abortions, Roe and its progeny would be relevant to the extent that they would render such a law invalid." State v. Clowes, 100 Or App 266, 276, n 5, 785 P2d 1071 (1990) (Graber, J., specially concurring).

Let us now turn to ORS 161.200.[25] To determine whether the choice of evils defense set forth in ORS 161.200 is available to defendants in this case, we must first decide whether to permit its use by them would, in the words of subsection (1), be "inconsistent * * * with some other provision of law," as that phrase has meaning in the context of ORS 161.200(1). If allowing the defense would be "inconsistent with some other provision of law," it may not be asserted. If not, then the availability of the defense is dependent upon whether the other preconditions to its use set forth in ORS 161.200 are satisfied.

The phrase "inconsistent with some other provision of law" is not defined in the statute. It is appropriate, therefore,

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[25] See supra note 1.

to examine legislative history surrounding the enactment of ORS 161.200 for clues to that phrase's meaning.

ORS 161.200 was enacted as section 20 of the 1971 revision to the Oregon Criminal Code. The commentary to the Proposed Oregon Criminal Code Section 20 states that it was derived from Model Penal Code Section 3.02, New York Revised Penal Law Section 35.05(2) and proposed but not enacted Michigan Revised Criminal Code Section 605. Subsection (1) of ORS 161.200 is substantially similar to the proposed Michigan statute.[26] Under the proposed

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[26]The proposed Michigan statute provided:

> "(1) Unless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law, conduct which would otherwise constitute an offense is justifiable and not criminal when it is necessary as an emergency measure to avoid an

Michigan statute, the defense is available

> imminent public or private injury [which is about to occur by reason of a situation occasioned or developed through no fault of the actor, and which] is of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding the injury sought to be prevented by the statute defining the offense in issue.
>
> "(2) The necessity and justifiability of conduct under subsection (1) [may] not rest upon considerations pertaining only to the morality and advisability of the statute, either in its general application or with respect to its application to a particular class of case arising thereunder. [Whenever evidence relating to the defense of justification under this section is offered by the defendant, the court shall rule as a matter of law whether the claimed facts and circumstances would, if established, constitute a justification.]"

The bracketed language was omitted from the Oregon statute.

"[u]nless inconsistent with other provisions of this chapter defining justifiable use of physical force, or with some other provision of law." (Emphasis added.) Proposed Michigan Revised Criminal Code Section 605(1). The Model Penal Code counterpart permitted the defense if:

> "(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and
>
> "(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and
>
> "(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.

Model Penal Code Section 3.02(1) (1962) Official Draft.

The New York statute makes the defense available "[u]nless otherwise limited by the ensuring provisions of this article defining justifiable use of physical

force[.]" New York Penal Law Section 35.05(2).

There is little in the legislative history of ORS 161.200 that helps us to discern what the legislature intended by the broad language "inconsistent * * * with some other provision of law." It is apparent, however, that that language is more restrictive than its New York counterpart. It also is clear, as the majority of the Court of Appeals said, that the phrase "inconsistent * * * with some other provision of law," as used in the Oregon statute, does not "mean[] the same thing as § 3.02(1)(c) of the Model Penal Code. ORS 161.200(1) does not require, as does the Model Penal Code, an express legislative foreclosure of the defense; it requires only that the defense be inconsistent with some other provision of

law." State v. Clowes, supra, 100 Or App at 272.

In City of St. Louis v. Klocker, 637 SW 2d 174 (Mo App 1982), three defendants were charged with trespass after they had entered an abortion clinic, attempted to dissuade patients from having abortions by detailing their physical and psychological dangers, and blocked access to the procedure rooms by sitting in a doorway. At the trial on charges of trespassing, they raised the statutory affirmative defense of necessity. The defendants contended that the injury avoided by their conduct was the "killing of human life" by the abortions of unborn fetuses. The Missouri Court of Appeals ruled as a matter of law that the defense was not available to the defendants. The court stated, inter alia, that the Missouri statute [§ 563.026 RSM 1978] provides that necessity is

available as a defense only if it is not "'inconsistent * * * with some other provision of law.'" Id. at 177. The Missouri court interpreted that language to "simply mean[] that the legislature's decision prevails if and when it makes specific value choices," and that "'competing values which have been foreclosed by deliberate legislative choice are excluded from the general defense of justification[.]'" Id. The court found that the Missouri legislature had made specific value choices in the area of abortion.

We believe that the interpretation given by the Missouri court captures the essence of what the Oregon legislature intended by its conscious choice to include the broad language "inconsistent * * * with some other provision of law" in ORS 161.200(2). The Oregon legislature

made a deliberate value decision when, in 1983, as previously discussed, it repealed the Oregon statutes that restricted a woman's right to terminate her pregnancy and enacted law that assumes abortions will be performed. Here, the actions that defendants sought to prevent were actions permitted under Oregon law. The interests that defendants seek to vindicate are not, therefore, consistent with that legislative decision. The present state of Oregon law is that a decision to terminate a pregnancy is a matter between a pregnant woman and her doctor. Hence, the defense of choice of evils, ORS 161.200, is unavailable to defendants in this case because it is, in the words of the statute, "inconsistent * * * with some other provision of law." ORS 161.200(1).

There is yet another reason why the defense of choice of evils is unavailable

to defendants in this case. Even if the defense were not "inconsistent * * * with some other provision of law," a precondition to the availability of the defense is that the defendants' "conduct [must be] necessary as an emergency measure to avoid an imminent public or private injury." (Emphasis added.) ORS 161.200(1)(a). Here again, neither the statute nor legislative history supplies us with the intended meaning of the statutory terminology "public or private injury." Normally, in the legal sense, a public or private injury, when caused by a human being, presupposes the actionable invasion of some right. City of St. Louis v. Klocker, supra, 637 SW 2d at 176 ("no actionable invasion of rights occurs in legally protected activity.") As previously discussed, Oregon law does not prohibit voluntary and properly performed

termination of pregnancies. Moreover, this court has never held that such a termination of pregnancy constitutes a tort.[27] We believe it is only reasonable to conclude that what is lawful and nontortious is not a "public or private injury," as that language has meaning in the context of ORS 161.200(1)(a). Since termination of pregnancies are legal, nontortious activity under present Oregon law, their occurrence cannot be a "public or private injury." Because none of the terminations of pregnancies, which defendants sought to prevent in this case, is a "public or private injury" under ORS 161.200(1)(a), defendants are

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[27]Our decisions in Libbee v. Permanente Clinic, 268 Or 258, 518 P2d 636, 520 P2d 361 (1974), and Mallison v. Pomeroy, 205 Or 690, 291 P2d 225 (1955), providing causes of action for injury to or the death of a viable fetus, have not been extended to voluntary and properly performed terminations of pregnancies.

foreclosed from asserting the defense of choice of evils.

The decision of the Court of Appeals is affirmed. The judgment of the Multnomah County District Court is affirmed.